SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-298

PROCESS EQUIPMENT ENGINEERING COMPANY, INC.,

Petitioner

v.

TENNESSEE EASTMAN COMPANY, A DIVISION OF EASTMAN KODAK COMPANY,

Respondent

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY BRIEF FOR RESPONDENT

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On Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY BRIEF FOR RESPONDENT

I

QUESTIONS PRESENTED

1. Should Writ of Certiorari be granted, in a diversity action, to review the decision of the Court of Appeals affirming the District Court, that a third-party tortfeasor's action for indemnity against the injured party's employer is barred by the Tennessee Workmen's Compensation Law,

a decision involving solely a question of local law which has not been determined by the Supreme Court of Tennessee, but which is also in accord with the interpretation of Tennessee law as construed by other United States District Courts in Tennessee?

Answer: No.

2. Did the Court of Appeals, in this Tennessee diversity case, correctly hold, as did the District Court, that in the absence of a contract of indemnity, an employer, who has paid an injured employee the benefits provided by the Tennessee Workmen's Compensation Law, is not liable for indemnity to a third-party tortfeasor, under Tennessee's active-passive negligence rule?

Answer: Yes.

II

STATEMENT OF THE CASE

GENERAL NATURE OF THE ACTION. In this diversity case, the principal lawsuit was a product liability action to recover damages for personal injuries sustained by an employee in a Tennessee industrial accident. This action was commenced in the United States District Court, Eastern District of Tennessee, Northeastern Division, with the original plaintiff being Jerry Dawn and wife, Wanda Dawn (Dawn) and the original defendants being Essex Conveyors, Inc. (Essex) and Process Equipment Engineering Company, Inc. (Process), the manufacturers of the product involved in this litigation. Tennessee Eastman Company (Eastman) who is Dawn's employer and United States Fidelity and Guaranty Company (USF&G), the workmen's compensation insurance carrier for Eastman, intervened in the product liability action to assert their statutory subro-

gation lien against any recovery by Dawn in the product liability action.

FACTUAL STIPULATION. The parties stipulated that at all times material to this action: Jerry Dawn and Wanda Dawn were husband and wife; that Jerry Dawn was employed by Eastman at its industrial plant in Sullivan County, Tennessee; that on and before the date of the accident, Dawn and Eastman, in their relationship as employee-employer, were operating under and bound by the Tennessee Workmen's Compensation Law in effect on December 15, 1970, the date of the accident resulting in the injuries to Dawn; and that for his injuries sustained in this industrial accident, Eastman or its insurance carrier have paid and are now paying Dawn the benefits provided by the Tennessee Workmen's Compensation Law.

DAWN'S CLAIM AGAINST ESSEX AND PROCESS. In the products liability action, Dawn claims that Essex manufactured and Process participated in the design and manufacture of a hoist dumper that was sold to and used by Eastman in its Kingsport, Tennessee plant until December 15, 1970; that on this date Dawn, an apprentice mechanic who was unfamiliar with the machine, was directed to crawl under the hoist to check it for repairs; that he turned off the machine and locked it with a safety key provided by Process and Essex; that as he entered under the machine, it suddenly fell pinning him to the floor and injuring him. Dawn alleges no act or acts of negligence on the part of Eastman. Dawn's right to recovery is limited to the following acts of negligence alleged to have been committed by Essex and Process: (i) that Essex and Process negligently designed the machine in two particulars; first, without providing a secure locking device to hold the machine in the "up" position; and second, by de-

signing the machine without a safety shield around the gear unit so as to protect the unit from foreseeable foreign filaments; (ii) that Essex and Process failed to warn users of the product of the hazards involved due to the defective design; (iii) that Essex and Process were strictly liable in tort because the machine was negligently designed and manufactured and was in both a dangerous and defective condition upon leaving the hands of the defendants and reached Eastman without substantial change; and (iv) that Essex and Process were liable for the tort of misrepresentation, because they had misrepresented material facts concerning this machine, upon which Dawn relied.

ANSWERS OF ESSEX AND PROCESS. In their answers, Essex and Process denied that they were guilty of any of the wrongs complained of by Dawn in the products liability action and alleged that Dawn was guilty of proximate contributory negligence; that Dawn had assumed the risk of injury and alleged that Eastman's negligence was the sole and proximate cause of Dawn's injuries and constituted an independent intervening cause.

COUNTERCLAIMS FOR INDEMNITY FILED BY ESSEX AND PROCESS AGAINST EASTMAN. Third-party actions for indemnity were filed against Eastman by Essex and Process, first by two separate third-party complaints, and thereafter by separate counterclaims.

Essex and Process claim that Eastman, after it installed the dumper in its plant, was guilty of alleged active negligence proximately causing Dawn's injuries, in one or more of the following: (i) that Eastman negligently failed to inspect, maintain, and instruct its employees in the proper and safe manner for the removal of fibrous filaments from the dumper's sprocket drive; (ii) that Eastman failed to

furnish Dawn a safe place to work by enclosing the dumper with a fence; (iii) that Eastman possessed knowledge, superior to that of Essex, as to the filaments around which the machinery would be operating and the propensity of such to clog the machinery and neglected to inform Essex thereof so as to permit Essex to design a machine which would not become clogged with such filaments; (iv) that Eastman breached its duty to Essex and Process to use reasonable care not to expose Essex and Process to liability for the injuries sustained by Dawn.

CROSS-CLAIMS FOR INDEMNITY OR CONTRIBUTION. By cross-claim, Essex sued Process for indemnity or contribution and claimed: that Process knew that the dumper would be used by Eastman in an area where fibrous filaments would interfere with the operation of the machine and that Process negligently designed the machine by failing to protect against this interference; that Process was guilty of active negligence and the negligence, if any, of Essex was passive.

Process also sued Essex for indemnity or contribution and claimed that Essex knew that the dumper would be used to salvage fibrous filaments at the Eastman plant and failed to design a guard to protect the sprocket drive of the dumper against these filaments; and based its claim upon Tennessee's active-passive negligence rule, claiming that Essex was guilty of active negligence and that Process' negligence, if any, was passive.

EASTMAN'S MOTION FOR JUDGMENT. After answering the third-party actions denying any liability asserted therein, Eastman filed motions for judgment on the pleadings or, alternatively, for summary judgment.

MEMORANDUM OPINIONS OF THE DISTRICT COURT. In this case, Judge Neese handed down two separate Memorandum Opinions and in each Opinion, the District Court sustained Eastman's motion and dismissed the indemnity actions filed against it by Essex and Process. In its first Memorandum Opinion filed March 19, 1973 (Appendix A), the District Court held that under the Tennessee Workmen's Compensation Law, T.C.A. § 50-908, Dawn is barred from maintaining a tort action against Eastman for his injuries, and for the same reason, the derivative claim of the plaintiff, Mrs. Dawn, for loss of her husband's consortium, is likewise barred. In its second Memorandum Opinion filed September 6, 1973 (Appendix B), the District Court held that Tennessee's active-passive negligence rule is limited to cases where both the active and the passive joint-tortfeasor share a common liability *in tort* to the injured plaintiff, and since, in this case, Eastman, as the employer is not liable *in tort* to Dawn, Eastman, as a matter of law, is not liable for indemnity to Essex and Process. In both of its Memorandum Opinions, the District Court further held that, in the products liability action, Dawn charged Essex and Process only with acts of active negligence and, therefore, if Dawn recovers in the products liability action, such judgment must necessarily be predicated upon a finding that Essex and Process have been guilty of active negligence and therefore not entitled to indemnity under Tennessee law.

SETTLEMENT OF PRODUCTS LIABILITY ACTION AND OF CROSS-CLAIMS. The main products liability action between Dawn and Essex and Process, and the cross-claims of Essex and Process filed against each other, came on for trial to a jury commencing on October 1, 1973, and after some eight days of trial, the jury was discharged when Dawn, Essex and Process, through their attorneys, an-

nounced to the Court that the action then being tried by the jury had been settled. The pending indemnity claims, which Essex and Process had previously filed against Eastman, had not been set for trial and were in no way involved in the jury trial referred to above. By stipulation, approved by the District Court and filed on October 11, 1973, Dawn, Essex and Process stipulated that the matters in controversy between them had been settled and that an order could be entered dismissing the original action between the plaintiffs, Dawn, and the defendants, Essex and Process and also the cross-claims between Essex and Process. As shown thereby, Eastman was not a party to this stipulation, nor was it approved by Eastman's attorneys, although it was stated therein that the stipulation would in no wise affect the indemnity claims of Essex and Process against Eastman. Although not included in the stipulation referred to above, there is an additional fact which we believe is material, if not crucial, to a decision of the questions presented herein. This is the fact that, although Eastman had full notice of the litigation and was interpleaded as a party thereto, Essex and Process did not, prior to their settlement of the products liability action with Dawn, either seek Eastman's approval of any proposed settlement or tender the defense of the products liability action to Eastman in exchange for a hold-harmless agreement which would constitute Eastman's financially responsible guarantee that Essex and Process would under no circumstances be forced to pay more than the sum for which they were prepared to pay for this settlement.

OPINION OF THE COURT OF APPEALS. In its opinion filed June 20, 1974 (Appendix C), the Court of Appeals held that the petitioner's action for indemnity under the active-passive doctrine was barred by the Workmen's Compensation Law, namely T.C.A. §50-908, thereby affirming the

judgment of the District Court. The Court of Appeals based its decision on the requirement under Tennessee law, that indemnity is allowed only where both the active and passive tortfeasors share a common liability *in tort* to the injured party and that in the case at bar, common liability was absent because Eastman was not liable to plaintiff *in tort* as the injured employee's exclusive rights against Eastman were under the Workmen's Compensation Law. The Court declined to express an opinion as to the District Court's holding that petitioner would be unable to meet the requirements of the active-passive negligence doctrine because any judgment based upon the active negligence allegations of the complaint would necessarily involve more than passive negligence.

PETITION FOR WRIT OF CERTIORARI. Only Process has filed a Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals. Respondent was granted an extension to file its Reply Brief by the Clerk under paragraph 5 of Rule 34, to November 4, 1974.

III

ARGUMENT

A. THERE ARE NO SPECIAL AND IMPORTANT REASONS REQUIRING REVIEW OF THIS CASE ON WRIT OF CERTIORARI.

This is a diversity case involving no federal or constitutional question, but only the construction of the local law of Tennessee under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Both the District Court and the Court of Appeals held under Tennessee law, that an employer is not liable for indemnity to a third-party tortfeasor

for compensable injuries sustained by its employee. The significance of the decision is isolated to these particular litigants. There is herein no reason for review of the character set forth as the criteria under Rule 19 of the Supreme Court Rules.

A review of this decision would be contrary to this Court's general practice. This Court has recognized that ordinarily it accepts determinations of Courts of Appeals on questions of local law. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). Particularly, the decisions usually are not disturbed where, as in the case at bar, the same conclusion was reached by the District Court and the Court of Appeals. *Appalachian Power Co. v. American Institute of Certified Public Accountants*, U.S. 80 S. Ct. 16, 4 L. Ed. 2d 30 (1959). Application of this rule is even more compelling in this instant case since the same determination has been made by two other District Courts sitting in Tennessee; namely, by Judge Frank W. Wilson of the Eastern District in *Smith v. Illinois Central R.R. Co.*, 263 F. Supp. 70 (E.D. Tenn. 1967); and by Judge Frank Gray, Jr. of the Middle District in *Union Carbide Corp. v. Dunn Bros. General Contractors, Inc.*, 294 F. Supp. 704 (M.D. Tenn. 1968). Judge Charles G. Neese, who decided the case at bar, has rendered a similar opinion in the more recent cases of *Greene v. Wean United, Inc.* and *McCoy v. Wean United, Inc.*, Civil Action Nos. 3098 and 3099 (E.D. Tenn. filed April 25, 1974). These are the only District Courts in Tennessee wherein the question is known to have been raised.

The decision of the Court of Appeals is not in conflict with any decision of the Appellate Courts of Tennessee where the question apparently has not been presented. This Court has held that a clear showing of error is required to overrule lower Courts in their application of

Erie. *Francis v. Southern Pacific Co.*, 333 U.S. 445 (1948); *Propper v. Clark*, 337 U.S. 472 (1949), reh. den. 338 U.S. 841.

B. THE COURT OF APPEALS CORRECTLY HELD, AS DID THE DISTRICT COURT, THAT AN EMPLOYEE WHO HAS PAID AN INJURED EMPLOYEE THE BENEFITS PROVIDED BY THE TENNESSEE WORKMEN'S COMPENSATION LAW, IS NOT LIABLE FOR INDEMNITY TO A THIRD-PARTY TORTFEASOR.

1. Eastman is Not Liable in Tort to Dawn Under the Tennessee Workmen's Compensation Law.

Under the Tennessee Workmen's Compensation Law, a Tennessee employer is not liable in tort for injuries sustained by an employee in an industrial accident, even if proximately caused by the employer's negligence, T.C.A. §50-908 providing that rights to compensation "shall exclude all other rights and remedies of such employee, his personal representative, dependents, or next of kin, at common law or otherwise, on account of such injury or death".

In *Liberty Mutual Insurance Co. v. Stevenson*, 212 Tenn. 178, 368 S.W.2d 760 (1963), the Tennessee Supreme Court, commenting on T.C.A. §50-908, held that:

> "This Act (Workmen's Compensation) constitutes a complete substitute for previous remedies in tort on the part of the employee *** The Legislature has made the rights of the employee and employer the exclusive remedy. ***" (212 Tenn. at p. ...)

By T.C.A. §25-109, Tennessee abolished its common law rule and created a new statutory cause of action which granted a wife the right to sue in tort for damages for the

loss of consortium proximately resulting from personal injuries sustained by her husband. In *Nichols v. Benco Plastics, Inc.*, 225 Tenn. 334, 469 S.W.2d 135 (1971), the plaintiff, basing her action on T.C.A. §35-109, sued her husband's employer in tort to recover damages for loss of consortium resulting from her husband's injuries caused by the employer's negligence. The Tennessee Supreme Court dismissed the wife's action and held that T.C.A. §25-109 did not "increase the liability of employers subject to Workmen's Compensation liability." (Ib. 469 S.W.2d at page 138.)

Eastman, therefore, cannot be liable *in tort* either to Jerry Dawn or his wife for the injuries sustained by Dawn in this industrial accident.

2. The United States District Courts Have Held That Under Tennessee Law Indemnity Is Not Available Against an Employer Where Employer Provides Benefits to the Employee under the Tennessee Workmen's Compensation Law.

In *Union Carbide Corp. v. Dunn Bros. General Contractors, Inc.*, 294 F. Supp. 704 (M.D. Tenn. 1968), the District Court held that by virtue of the Tennessee Workmen's Compensation Law, an employer is not liable in tort for compensable injuries sustained by his employee, whether such liability is sought to be imposed by an action for contribution or for indemnity under Tennessee's active-passive negligence rule. In this case, Judge Gray said:

> "The purpose of the Workmen's Compensation Act is to provide the employee with compensation for injuries sustained in the course of his employment, without imposing upon him the burden of establishing liability under the traditional negligence principles. The remedy provided by the Act, excludes 'all other rights and reme-

dies of such employee, his personal representative, dependents, or next of kin, at common law or otherwise***'. T.C.A. §50-908. The burden of providing this compensation is placed on the employer, on whom liability is imposed irrespective of the presence or absence of fault on his part. Although strict liability is imposed, the extent of such liability is limited by the Act to the benefits prescribed therein. See T.C.A. §50-1001 et seq. In the opinion of the court, the employer's liability cannot be extended beyond these prescribed benefits in the absence of an express contractual undertaking by the employer or an independent liability arising by operation of law. By virtue of the Act, therefore, the employer is not liable in tort for injuries sustained by his employees in the course of their employment, whether such liability is sought to be imposed by an action for contribution from a joint tortfeasor or by an action for indemnity under the Tennessee active-passive negligence rule. ***" (294 F. Supp. at pages 706-707).

Smith v. Illinois Central Railroad Company, 263 F. Supp. 70 (E.D. Tenn. 1967), involved the right to contribution from an employer covered by the Tennessee Workmen's Compensation Law whose employee had been killed in the course of his employment. This case arose before the enactment of the Uniform Contribution Among Tort-Feasors Act, T.C.A. §23-3101, et seq. In holding that the employer was not liable for contribution, Judge Wilson said:

"The issue here presented does not appear to have been ruled upon by the Tennessee courts. The majority of cases from other jurisdictions have ruled against any right upon the part of a tortfeasor to recover either indemnity or contribution from an employer alleged to

have been a joint-tortfeasor but whose liability to the injured party is limited to the benefits due under the terms of the Workmen's Compensation Act. *Husted v. Consumers Power Co. v. Hertel Deyo Co.*, 376 Mich. 41, 135 N.W.2d 370 (1965); *Trammell v. Appalachia Electric Co-op.* (E.D. Tenn., 1955), 135 F. Supp. 512; see also 18 Am. Jur. 2d, 'Contribution', Sec. 48 and Annotation 53 A.L.R. 2d 977. The rationale of many cases following the majority rule appears to be that no right of contribution will lie against the employer in favor of a third-party tortfeasor, since there is no common obligation or common liability to the injured party as between the employer and the tortfeasor. ***" (263 F. Supp. at page 71).

Petitioner in its brief relies upon an earlier decision of Judge Charles G. Neese in *Roberson v. Bitner*, 221 F. Supp. 279 (E.D. Tenn. 1963). This case was distinguishable by the Court in *Smith v. Illinois Central Railroad Co.*, *supra*, and not followed by the Court in *Union Carbide Corp. v. Dunn Bros. General Contractors, Inc.*, *supra*. It is, perhaps, sufficient to state, as respondent has also noted, that Judge Neese, in the case at bar, as well as in a later presently unpublished opinion in the cases of *Greene v. Wean United, Inc.* and *McCoy v. Wean United, Inc.*, Civil Action Nos. 3098 and 3099 (E.D. Tenn. filed April 25, 1974), has concluded that third-party indemnity actions against an employer under the active-passive negligence doctrine are barred by T.C.A. §50-908, so that the District Court's holdings are uniform.

In any event, we question whether there is conflict between *Roberson* and the case at bar and *McCoy*. In *Roberson v. Bitner*, a North Carolina employer claimed he was not liable for indemnity under North Carolina's compensation law for injuries to his North Carolina employee arising from a Tennessee motor vehicle accident. The Ten-

nessee Workmen's Compensation Law was not involved in the *Roberson* case. The only question decided by Judge Neese in *Roberson* was one of conflict of laws: "*** whether the substantive law of Tennessee, the forum state, or the compensation statutes of North Carolina are to be applied herein. ***" (Ib. 221 F. Supp. at p. 281.) It concluded that the workmen's compensation statutes of North Carolina were not applicable in that case. Therefore, any expressions in the case concerning the effect of compensation statutes upon an employer's liability for indemnity were by way of dictum only.

In *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, 100 L. Ed. 133, 73 S. Ct. 232, relied on by Process, the Supreme Court held that the exclusive remedy provisions of the compensation act there involved did not preclude an action for indemnity based solely on the breach of an express contractual duty owed by the employer to the original defendant who had been held liable for the employee's injuries. In pretermitting the question of indemnity against an employer not liable in tort to the employee, under the active-passive negligence rule, this Court said:

> "Because (the original defendant) *** relies entirely upon (the employer's) contractual obligation, we do not meet the question of a noncontractual right of indemnity or of the relation of the Compensation Act to such a right." (Ib. 350 U.S. at 132; 100 L. Ed. at 141.)

Thus *Ryan* is inapposite because Process based their indemnity claim on Tennessee's active-passive negligence rule.

Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 10 L. Ed. 2d 1, 83 S. Ct. 926 (recalled for assessment

of costs 10 L. Ed. 2d 1049), also relied on by Process involved the historic admiralty rule of divided damages in mutual fault collisions, which is akin to common law contribution and not indemnity.

3. The Requirement of Common Tort Liability is Apparent From The History of Indemnity Under the Common Law of Tennessee.

Tennessee adopted the rigid English common law rule, as announced in *Merryweather v. Nixan*, 8 Tenn. Rep. 186, 101 Eng. Rep. 1337 (1799), and denied both indemnity and contribution between *joint-tortfeasors*. See *Cohen v. Noel* (1933, 165 Tenn. 600, 603. In *Merryweather v. Nixan*, *supra*, which is the general basis of Tennessee's common law rule, the injured plaintiff had recovered a joint judgment against two *joint-tortfeasors* and the Court held there was no contribution between joint-tortfeasors who shared a common liability *in tort* to the injured plaintiff. (See: *Prosser, Law of Torts*, 3rd Ed. Ch. 47, page 273).

Tennessee's active-passive negligence rule was developed by case law beginning with *Cohen v. Noel* (1933), 165 Tenn. 600, 56 S.W.2d 744, a case in which the joint-tortfeasors did share a common liability *in tort* to the injured plaintiff. As shown by the opinion in *Cohen*, the Tennessee Supreme Court makes it crystal clear that the active-passive rule then being adopted constituted an *exception* to the general common law rule, previously prevailing in Tennessee, that prohibited indemnity between joint-tortfeasors where both shared a common liability to the injured plaintiff. Thus, as an *exception* to the general common law rule denying indemnity between joint-feasors, Tennessee's active-passive negligence rule presupposes that the passive and the active tortfeasors

are joint-tortfeasors who share a common liability *in tort* to the injured plaintiff. In every Tennessee case that we have found, indemnity has been allowed under Tennessee's active-passive negligence rule only where both the active and passive joint-tortfeasors shared a common liability *in tort* to the injured plaintiff.

In the case of *Scarbrough v. Murrow Transfer Company* (D.C. Tenn. 1967), 277 F. Supp. 92, 93, headnote 7 is as follows:

> "An action for contribution and/or indemnity will lie in Tennessee as between joint tort-feasors, but no such action will lie in absence of a common tort liability to the injured party."

In *Prosser, Law of Torts*, 3rd Ed. page 281, footnote 10, states in part, as follows:

> "As in the case of contribution, indemnity is not allowed against one who has a defense, such as family immunity, against the original plaintiff. *Chamberlain v. McCleary*, E.D. Tenn. 1963, 217 F. Supp. 591."

4. The Correctness of the Opinion of the Court of Appeals Is Evident From The Long-Settled Law in Tennessee Which Precludes One from Doing Indirectly that Which Cannot Be Done Directly.

In Tennessee, this rule has been applied without exception in cases where the indirect effect of a judgment, under Tennessee's law of indemnity, would fasten ultimate liability upon one who is not directly liable *in tort* to the injured plaintiff. In inter-family immunity cases, the Tennessee Supreme Court has applied its indirect-direct rule simply by denying the injured plaintiff any recovery in the main action against either the passive or active tortfeasor, thereby precluding indemnity against the alleged

tortfeasor who is not directly liable *in tort* to the injured plaintiff.

In *Raines v. Mercer* (1932), 165 Tenn. 415, a wife sued her husband's father under the family purpose doctrine for injuries caused by her husband's negligence while driving his father's car. In dismissing the wife's tort action because her husband would be liable in indemnity to his father, the Supreme Court of Tennessee held:

> "Since the defendant in error could not maintain her action against her husband, alleged to be directly responsible for her injury, she could not avoid the forbidden frontal attack by an encircling movement against (her husband's) father who had no part in the negligent transaction. (Citing cases)" (175 Tenn., p. 420)

In *Graham v. Miller* (1945), 182 Tenn. 434, 187 S.W. 2d 633, 162 A.L.R. 571, the Supreme Court of Tennessee dismissed the original tort action on the ground that, under Tennessee's active negligence rule, the original defendant, as a passive tortfeasor, may claim indemnity from the active tortfeasor, who was not liable *in tort* to the injured plaintiff.

In *Chamberlain v. McCleary* (D.C. Tenn. 1963), 217 F. Supp. 591, the district court questioned whether *Graham* continued to be in the law in Tennessee and followed the solution suggested in 27 *Tennessee Law Review* 422, 427, by allowing the plaintiff to maintain the main tort action against the original defendants, the alleged active tortfeasor who was immune from tort liability to the injured plaintiff under the family immunity doctrine of Tennessee, thereby precluding the passive tortfeasors from doing indirectly that which could not be done directly. Eastman would not be liable for indemnity in this case, either under *Graham* or under *Chamberlain*. If *Graham* is the law in

Tennessee, then there would be no indemnity because Process, as a matter of law, is not liable to Dawn in the main products liability action; and, if *Graham* is no longer the law in Tennessee, Eastman would not be liable for indemnity under *Chamberlain* because it is not liable *in tort* to the injured plaintiff.

C. ALTHOUGH PRETERMITTED BY THE COURT OF APPEALS, THE DISTRICT COURT ALSO BASED ITS DECISION ON THE GROUND THAT THERE IS NO RIGHT OF INDEMNIFICATION SINCE PROCESS, AS A MATTER OF LAW, IS CHARGED WITH ACTIVE NEGLIGENCE ONLY, WHICH PRECLUDES INDEMNIFICATION.

In *Tankrederiet Gefion A S v. Hymnan-Michaels Co.* (C.A. 6th 1969), 406 F.2d 1039, this Court held that where, during the course of trial, the original defendants settled the main action without tendering defense to a third-party defendant against whom they were seeking indemnity, the settling defendants have the burden of proving actual liability to the plaintiff in the main action rather than potential liability.

We submit that under *Tankrederiet*, Process must now prove actual liability to Dawn under the allegations contained in his products liability action, and in carrying this burden and establishing actual liability to Dawn, Process must necessarily prove that they were guilty of active negligence proximately causing Dawn's injuries. See *Schipper v. Lockheed Aircraft Corporation*, 278 F. Supp. 743 (S.D. N.Y. 1968). *Viens v. Anthony Company*, 282 F. Supp. 983 (D.C. VT 1968). *Roberts v. Richland Manufacturing Co.*, 260 F. Supp. 274 (W.D. Mich. 1966).

CONCLUSION

It is submitted that, under Rule 19, of this Court, this is not a proper case for issuance of the Writ of Certiorari; that the judgments of the two lower Courts, both of which are conversant with Tennessee law, are correct and the Writ of Certiorari should be denied for the reasons set forth in this brief and in the opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION

JERRY DAWN, ET UX.,
Plaintiffs,

v.

ESSEX CONVEYORS, INC., ET AL.,
Defendants and third-party plaintiffs,

v.

TENNESSEE EASTMAN COMPANY, ETC.,
Third-party Defendant.

Civil action No. 2809

MEMORANDUM OPINION AND ORDER

(Filed March 19, 1973)

The plaintiffs here seek damages for personal injuries proximately resulting from a defect in equipment manufactured and sold by the defendants Essex Conveyors, Inc. (Essex) and Process Equipment Engineering
[fol. 2] Company, Inc. (Process). Essex impleaded the third-party defendant Tennessee Eastman Company, etc. (Eastman) for contribution or indemnification, and Process impleaded it for indemnification. Eastman moved for a judgment on the pleadings, Rule 12 (c),

Federal Rules of Civil Procedure, as to such third-party actions.

The third-party plaintiffs are entitled to proceed against the third-party defendant only if Eastman " * * * is or may be liable * * *" to them " * * * for all or a part of the [plaintiffs' claims] against * * * " them. Rule 14 (a), Federal Rules of Civil Procedure; *Gipson v. Shelley*, D.C. Tenn. (1963), 219 F. Supp. 915, 916. " * * * Rule 14 [*supra*] is strictly limited to situations where the very existence of potential liability in the third-party defendant is dependent upon the outcome of the action on the main claim. * * * " *Joe Grasso & Son, Inc. v. United States*, D.C. Tex. (1966), 42 F. R. D. 329, 333 [5], affirmed C.A. 5th (1967), 380 F. (2d) 749.

It is stipulated that at pertinent times the plaintiffs Mr. and Mrs. Dawn were husband and wife, and that the em-
[fol. 3] ployment relation of Mr. Dawn and Eastman was subject to the provisions of the Tennessee Workmen's Compensation Law, T. C. A. §§ 50-901, et seq. The liability of Eastman to Mr. Dawn for an injury arising in the scope and out of the course of such employment is governed exclusively by such law. T. C. A. § 50-908. Mr. Dawn being thus barred from maintaining a tort action against Eastman for his injury, *Liberty Mutual Inc. v. Stevenson* (1963), 212 Tenn. 178, 182, 368 S.W. (2d) 760, the third-party plaintiff Essex has no right of contribution from Eastman. Uniform Contribution Among Tort-Feasors Act, T. C. A. §§ 23-3101, et seq. And, for the same reason, the derivative claim of the plaintiff, Mrs. Dawn, for loss of her husband's consortium, T. C. A. § 25-109, is likewise barred; and such third-party plaintiff has no right of action for contribution against Eastman on that account. *Idem.*; *Nichols*

v. Benco Plastics, Inc., ___ Tenn. ___, 469 S.W. (2d) 135, 138 [4].

The fact that the employment relation of Mr. Dawn and Eastman is governed by the Tennessee Workmen's Compensation Law, *supra*, does not encompass or
[fol. 4] limit the third-party actions herein, if the third-party plaintiffs are entitled to indemnity under a substantive right recognized by Tennessee law. *Roberson v. Bitner*, D.C. Tenn. (1963), 221 F. Supp. 279, 281 [1]. Tennessee recognizes the substantive right of indemnification between joint tort-feasors in situations wherein a passive tort-feasor seeks indemnification from an active tort-feasor. *Roberson v. Bitner*, D.C. Tenn. (1963), 218 F. Supp. 764, 766, quoting from *Cohen v. Noel* (1933), 165 Tenn. 600, 56 S.W. (2d) 744, 745.

If the plaintiffs obtain a judgment against the defendants on the basis of one or more acts of negligence in connection with the sale and distribution of their equipment, this would necessarily involve more than passive negligence on the respective parts of the defendants and third-party plaintiffs Essex and Process. *Lopez v. Brackett Stripping Machine Company*, D.C. Ill. (1969), 303 F. Supp. 669, 670 [1]. The plaintiffs' claims of breach of warranties do not involve an issue of active-passive negligence. *Schripper v. Lockheed Aircraft Corporation*, D.C. N.Y. (1968), 278 F. Supp. 743, 746 [7].

[fol. 5] As stated, Eastman is already liable to the plaintiff Mr. Dawn and compensating him under the Tennessee Workmen's Compensation Law. There is no claim by the third-party plaintiffs that Eastman agreed expressly to indemnify either Essex or Process against their own breach of duty. The third-party defendant Eastman owed no obligation to the third-party plaintiffs in con-

nection with Eastman's use of the equipment involved, Eastman's duty in connection therewith being confined to that it owed Mr. Dawn and his fellow employees. *Auld v. Globe Indemnity Company*, D.C. La. (1963), 220 F. Supp. 96, 98-99. Even if Eastman is guilty of all the acts of negligence imputed to it by the allegations of the third-party complaints, still it breached no implied duty of care owing to the third-party plaintiffs. *Ibid.*, 220 F. Supp. at 99. As Eastman is solely liable to the plaintiff Mr. Dawn under the Compensation Law, the third-party plaintiffs are not permitted to implead Eastman. *Schwab v. Erie Lackawanna Railroad Co.*, C.A. 3d (1971), 438 F. (2d) 62, 66, cited in *Millard v. Municipal Sewer Auth. of Twp. of Low. Makefield*, C.A. 3d (1971), 442 F. (2d) 539, 541 [3].

[fol. 6] From all of this the Court concludes that where, as here, the plaintiffs have sued the defendants for active acts of negligence and that, but for the existence of the Workmen's Compensation Law, the plaintiffs could have sued the defendants and the third-party defendant as joint tort-feasors, Tennessee law does not permit a suit over against the third-party defendant on the ground that it was also guilty of some similar or equally causative, but different, negligent acts, which might also have constituted a proximate cause of the injury to the original plaintiffs. *Cf. General Dynamics Corporation v. Adams*, C.A. 5th (1965), 340 F. (2d) 271, 281 [14, 15]. It thus appearing that the third party defendant Eastman could under no theory be liable to the third-party plaintiffs Essex and Process " * * * for all or part of [the plaintiffs' claims] against * * * " the defendants and third-party plaintiffs, Rule 14 (a), *supra*, the motion of the third-party defendant Eastman for a judgment on the pleadings hereby is GRANTED, and the respective third-party actions of Essex and Process hereby are

DISMISSED.

ENTER:

/s/ C. G. Neese

(C. G. Neese)

United States District Judge

APPENDIX B

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

CIVIL ACTION NO. 2809

JERRY DAWN, ET UX.,
Plaintiffs,
v.
UNITED STATES FIDELITY AND GUARANTY COMPANY, ET AL.,
Intervening Plaintiffs,
v.
ESSEX CONVEYORS, INC.,
Defendant, Plaintiff-by-cross claim and Plaintiff-by-counterclaim,
and
PROCESS EQUIPMENT ENGINEERING COMPANY, INC.,
Defendant, Defendant-by-cross-claim and Plaintiff-by-counterclaim,
v.
TENNESSEE EASTMAN COMPANY,
Defendant-by-counterclaims.

Appendix B

MEMORANDUM OPINION AND ORDER

(Filed September 6, 1973)

The defendant-by-counterclaims Tennessee Eastman Company moved, *inter alia*, for a judgment on the pleadings between it and the plaintiffs-by-counterclaim Essex Conveyors, Inc. and Process Equipment Engineering Company, Inc., respectively, relating to the respective counter-claims of the latter. Rule 12(c), Federal Rules of Civil Procedure. For the reasons stated in this Court's memorandum opinion and order here of March 19, 1973 such motion has merit.

As was stated in 3 Products Liability (Frumer and Friedman) 716, §44.02 [3][d] as the general rule: "***[I]f the manufacturer was liable at all to the injured person, the manufacturer would necessarily have been actively negligent and therefore not entitled to indemnity. ***" The plaintiffs-by-counterclaim have no action for indemnity against the defendant-by-counterclaim because of the absence of a common tort liability among them unto the plaintiff Mr. Dawn. *Scarbrough v. Murrow Transfer Company*, D.C. Tenn. (1967), 277 F. Supp. 92, 96[7]. See also *Union Carbide Corporation v. Dunn Brothers General Contractors, Inc.*, D.C. Tenn. (1968), 294 F. Supp. 704, 707[7, 8];

Chamberlain v. McCleary, D.C. Tenn. (1963),
[fol. 3] 217 F. Supp. 591, 597-598[7]; *Birdsong v. General Motors Corp.*, D.C. Pa. (1951), 99 F. Supp. 163, 165[4], [5].

Accordingly, judgment on the pleadings will ENTER for the defendant-by-counterclaims Tennessee Eastman Company against the respective plaintiffs-by-counterclaim Essex Conveyors, Inc. and Process Equipment Engineering Company, Inc.

ENTER:

/s/ C. G. Neese
(C. G. Neese)
United States District Judge

APPENDIX C

[fol. 1] **Nos. 73-2174 through 73-2179**

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

JERRY DAWN, ET UX,
Plaintiffs,
UNITED STATES FIDELITY AND GUARANTY COMPANY and EASTMAN KODAK COMPANY,
Intervening Plaintiffs,

ESSEX CONVEYORS, INC.,
Appellant,
and
PROCESS EQUIPMENT ENGINEERING COMPANY, INC.,
Appellant,
v.
TENNESSEE EASTMAN COMPANY, A DIVISION OF EASTMAN KODAK COMPANY,
Appellee.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

Decided and Filed June 20, 1974.

Appendix C

Before: PECK and McCREE, Circuit Judges, and CECIL, Senior Circuit Judge.

[fol. 2] PECK, Circuit Judge. The appeals in this diversity case arose out of a products liability action to recover damages for personal injuries sustained by an employee in a Tennessee industrial accident that occurred in 1970. The plaintiffs, Jerry Dawn, and his wife, Wanda Dawn, filed a complaint against Essex Conveyor, Inc. (hereinafter "Essex") and Process Equipment Engineering Company, Inc. (hereinafter "Process"), appellants herein, alleging that they negligently designed and manufactured a "senior skip hoist dumper" used by Mr. Dawn's employer, Tennessee Eastman Company (hereinafter "Eastman") in its Kingsport, Tennessee plant, and that due to the alleged faulty design and manufacture, the dumper portion of the hoist fell on and grievously injured Dawn.

Essex and Process responded by filing general denials. The Eastman Kodak Company (Eastman's parent corporation) and its compensation insurance carrier filed an intervening complaint against Essex and Process to protect their statutory subrogation rights against any recovery by the plaintiffs in order to recoup the value of workmen's compensation benefits paid on Eastman's behalf. Appellants filed third-party complaints against Eastman for indemnity on the theory of active-passive negligence under the law of Tennessee, but the district court, by order entered March 19, 1973, dismissed the third-party complaints. Appellants moved the court to alter and amend that order to permit an immediate appeal, but the court did not act on the motion. Subsequently, they filed cross-claims against each other and counterclaims against Eastman for indemnity. By order of September 6, 1973, the

district court entered judgment on the pleadings in favor of Eastman on the counterclaims.

The main action involving the Dawns' claim against Essex and Process and the cross-claims between the appellants came on for jury trial in October 1973. Eastman did not participate in the proceedings. After eight days of trial, the litigants announced to the court that a settlement of all claims and cross-claims had been reached, but that the agreement did not affect any possible [fol. 3] third-party actions or counterclaims against Eastman.

Appellants requested that the court make final its March 19 and September 6 orders. The court, after noting that the third-party complaints and counterclaims had been disposed of by the above orders, and that all other claims and cross-claims had been settled, determined that "all the respective claims as to all the parties . . . have been finally determined or otherwise disposed of," and entered final judgment. Essex and Process each perfected separate appeals from the March 19 and September 6 orders, and from the final judgment. All six separately docketed appeals involve the same issue, were consolidated in the briefs and on oral argument, and will be considered as one herein.

The issue before us is simply stated: Can an employer who has paid an injured employee benefits due under the Tennessee Workmen's Compensation Law, T.C.A. § 50-901 et seq., be liable for indemnity to a third-party tortfeasor under the Tennessee active-passive negligence doctrine?

In this diversity action our answer to the above question must be formulated in accord with the dictates of Tennes-

see law. *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938). Unfortunately, no Tennessee appellate court has addressed itself to this issue, leaving for us the task of trying to determine what result would be reached by a Tennessee appellate court if it were deciding this case. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1941). We are not, however, without guidance in this endeavor. This question has been the topic of discussion in at least three case notes in the Tennessee or Vanderbilt Law Reviews.[1] Other jurisdictions have wrestled with this or similar issues.[2] And finally, there have been [fol. 4] four opinions rendered by federal district courts sitting in Tennessee (not including the decision in the instant case) which have undertaken to anticipate the ruling of the appellate courts of Tennessee on this question.

The holdings in the first three district court cases referred to above were summarized in the latest decision, from which we quote at some length.

> "The earliest of these [decisions] is *Roberson v. Bitner*, D.C. Tenn. (1963), 221 F. Supp. 279. In an opinion by the author of this opinion, it was held that the Tennessee Workmen's Compensation Law does not bar third-party actions if the respective third-party plaintiffs are found to be entitled to indemnity under

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[1] 13 Vand. L. Rev. 772 (1960); 24 Tenn. L. Rev. 1068 (1957); 4 Vand. L. Rev. 379 (1951).

[2] For a compilation of cases prior to 1956, see 24 Tenn. L. Rev. 1068 (1957). Examples of more recent cases: **Cacchillo v. H. Leach Machinery Co.**, 305 A.2d 541 (R.I. 1973); **Lampada v. State Sand & Gravel Co.**, 58 Wis.2d 315, 206 N.W.2d 138 (1973); **Kamali v. Hawaiian Elec. Co.**, 54 H. 153, 504 P.2d 861 (1972); **Dale v. Whiteman**, 388 Mich. 698, 202 N.W.2d 797 (1972); **Leech v. Georgia-Pacific Corp.**, 259 Or. 161, 485 P.2d 1195 (1971); **Hilzer v. MacDonald**, 169 Col. 230, 454 P.2d 928 (1969).

some substantive right recognized by Tennessee law. *Ibid.*, 221 F. Supp. at 281 [1]. Four years afterward, (now Chief) Judge Frank W. Wilson, of the Eastern District of Tennessee, declined to follow *Roberson*, *supra*. *Smith v. Illinois Central Railroad Company*, D.C. Tenn. (1967), 263 F. Supp. 70, 72. The following year, (now Chief) Judge Frank Gray, Jr., of the Middle District of Tennessee, reviewing the two aforementioned precedents, opted for the *Smith*, *supra*, rule. *Union Carbide Corp. v. Dunn Bros. General Contractors, Inc.*, D.C. Tenn. (1968), 294 F. Supp. 704, 706-707 [4-8]. No appeal appears to have been taken from any of those adjudications." *McCoy v. Wean United, Inc.*, Civil Actions Nos. 3098 & 3099 (E.D. Tenn., filed April 25, 1974).

In *McCoy*, Judge Charles Neese chose to overrule his earlier *Roberson* decision and to follow the *Smith* and *Union Carbide* opinions. He did so because he concluded that "Tennessee courts would hold that the Tennessee Workmen's Compensation Law, T.C.A. § 50-908, bars . . . third-party actions . . ." *McCoy*, *supra*. For reasons hereinafter appearing, we reach the same conclusion.

[fol. 5] The district court in the instant case dismissed the third-party complaints and counterclaims for indemnity because appellants would be unable to meet the requirements of the active-passive negligence doctrine advanced as the basis for Eastman's liability. This doctrine, the court noted, required that appellants prove, among other things, that their own negligence was only passive and that they shared, with Eastman, a common tort liability to plaintiffs. The court was of the opinion that these burdens could not be met because (1) any

judgment against appellants arising from allegations of plaintiffs' complaint would necessarily involve more than passive negligence, and (2) under Tennessee law (Workmen's Compensation Law) Eastman was not liable to plaintiffs in tort and thus no common tort liability could exist. We express no opinion as to the validity of the district court's first theory, but we are in accord with the rationale expressed in the second.

The Tennessee Workmen's Compensation Law, like similar compensation laws in other states, replaced with statutory benefits all common law rights an injured employee might have had against his employer for work related injuries. T.C.A. § 50-908 provides as follows:

> "Right to compensation exclusive.—The rights and remedies herein granted to an employee subject to the Workmen's Compensation Law on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, his personal representative, dependents, or next of kin, at common law or otherwise, on account of such injury or death."

Nearly every workmen's compensation law contains an equivalent section. In interpreting the above section the Tennessee Supreme Court has held that "[t]his Act constitutes a complete substitute for previous remedies in tort on the part of an employee . . . ." *Liberty Mutual Ins. Co. v. Stevenson*, 212 Tenn. 178, 182, 368 S.W.2d 760, 762 (1963). There can be no doubt that plaintiffs herein could not have brought a tort action against Eastman.

[fol. 6]

Essex and Process propose an indemnity action against Eastman on the basis of the active-passive negligence

theory. While such actions are generally permitted under Tennessee law, *Cohen v. Noel*, 165 Tenn. 600, 56 S.W.2d 744 (1933), indemnity is allowed only where both the active and the passive tortfeasors share a common liability in tort to the injured party. The logic of this requirement is manifested in the following summary of the theory behind indemnity actions: "[I]ndemnity . . . shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead." Prosser, Law of Torts, § 51 Indemnity, p. 310 (4th ed. 1971). As the court in *Scarbrough v. Murrow Transfer Co.* stated, "While an action for . . . indemnity will lie in Tennessee as between joint tortfeasors, . . . no such action will lie in the absence of a common tort liability unto the injured party." 277 F. Supp. 92, 96 (E.D. Tenn. 1967). Here, there was no common liability because Eastman was not liable to plaintiffs in tort.

The above argument, that common liability is required in indemnity actions, is often employed by courts in those jurisdictions which have rejected contribution and indemnity suits against employers bound by workmen's compensation laws.[3] It has been suggested by some writers that the common liability demanded in contribution cases (which courts dealing with indemnity questions have relied upon to a great extent) should not be similarly demanded in indemnity actions. While it is true that the problems encountered in a situation where there is contractual indemnity are substantially different from those faced in a contribution situation, indemnity under the active-passive negligence theory is more "akin to contribution between tortfeasors, and should be governed in this regard by the

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[3] 13 Vand. L. Rev. 772, 783, and cases cited therein.

[fol. 7] principles applied to contribution." *Chamberlain v. McCleary*, 217 F. Supp. 591, 597 (E.D. Tenn. 1963).

The decision in this case in no way affects the validity of third-party actions for indemnity based upon express or implied contract. We note, in this regard, that the majority of jurisdictions which have considered the question have held that compensation laws do not bar such actions. *See, e.g., Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956); *General Electric Co. v. Moretz*, 270 F.2d 780 (4th Cir. 1959) (interpreting Tennessee law). And, in fact, that is the result reached by this Court in *Brogdon v. Southern Ry. Co.*, 384 F.2d 220 (6th Cir. 1967), where we had occasion to deal with the same section of the Tennessee Workmen's Compensation Law.

We conclude that third-party indemnity actions under the active-passive negligence doctrine are barred by T.C.A. § 50-908, and the judgment of the district court dismissing their indemnity claims is affirmed.